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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
Petitioner,

v.

MARY A. CARLSON, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED*

Whether this Court should review a decision of the Fourth Circuit, not in conflict with any decision of any circuit or this Court, that automobile owners may proceed on pleadings that a manufacturer's attempt to limit the duration of the implied warranty of merchantability was unreasonable and unconscionable, as prohibited by 15 U.S.C. §2308(b), where the manufacturer knew, but concealed, that its defectively designed diesel engines would fail prematurely, catastrophically, and at extraordinarily high rates shortly after the expiration of the time limits sought to be imposed, but long before the normal expected useful life of diesel engines.

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*Respondents, who are plaintiffs below, include the persons listed at 49a-50a (bound with the Petition filed January 22, 1990), exclusive of the persons listed in the Cross-Petition at ii, separately filed this date. As far as counsel are aware, none of the respondents is a corporate entity, and neither of the two business entity respondents (Columbia Wholesale Company and Grooms Oil Company) have parent or subsidiary companies. The uncertified class that respondents propose to represent is described in the Petition at ii.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for a writ of certiorari, seeking review of a part of the Fourth Circuit's opinion reported at 883 F.2d 287, 292-296 (4th Cir. 1989) (9a-19a). That part of the opinion merely remanded for resolution on a developed factual record, and does not conflict with any decision of any court of appeals, of any state court of last resort, or of this Court. Petitioner argues that the decision raises an important

question of federal law, but all the Fourth Circuit did, after construing the statutory language in accordance with its plain meaning, was to reaffirm the fact-sensitive nature of issues of reasonability and conscionability, reaching the unremarkable conclusion that respondents' claims could not be dismissed on the bare pleadings.

JURISDICTION

The petition for a writ of certiorari was filed on January 22, 1990 and served on respondents' counsel by deposit in the U.S. first class mail on that date. This Court has jurisdiction to entertain the petition under 28 U.S.C. §1254(1) (1982).

STATEMENT OF THE CASE

This case was initially brought by more than 100 named plaintiffs as a class action under the Magnuson-Moss Warranty Act, 15 U.S.C. §2301 *et seq.* Plaintiffs are owners of 1981 to 1985 model year cars and light trucks equipped by defendant General Motors Corporation ("GM") with eight cylinder, 5.7 liter diesel engines ("GM diesels"). Plaintiffs allege that these GM diesels were defectively designed, causing frequent and costly engine failures long before such engines reasonably could be expected to require such repairs. GM is charged with liability for breach of the implied warranty of merchantability—*i.e.*, that these

prematurely failed diesels were not "fit for their ordinary purposes" under UCC §2-314(2)(c).

These GM diesels were sold with express, written warranties subject to durational limitations,[1] For example, 1981 and 1982 model year cars (which constitute the vast majority of the vehicles at issue) were covered fully for only 12 months or 12,000 miles, whichever came first. Limited additional coverage, with a $100 deductible, was provided through 24 months or 24,000 miles, whichever came first. Thereafter, these GM diesels had no express warranty protection.

GM sought to impose the same durational limitations on the implied warranty of merchantability that arises by operation of law, generally the Uniform Commercial Code. Under the Magnuson-Moss Act, such durational limitations on *implied* warranties are enforceable only if they are "of reasonable duration" *and* "conscionable". 15 U.S.C. §2308(b).

Respondents are among those persons whose GM diesels failed, prematurely and catastrophically, after the durational limitations expired. GM moved to dismiss respondents' claims on the pleadings, arguing that, as a matter of law, GM's own durational

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[1] The terms "express" and "written" warranties are used interchangeably herein, because the terms are identical for current purposes. "Written warranties" given by manufacturers or sellers of consumer products as defined in the Magnuson-Moss Act, 15 U.S.C. §2301(6), include many "express warranties" as defined in UCC §2-313, but do not include *oral* express warranties.

limitations on implied warranties are reasonable and conscionable.

The district court agreed with GM. The Fourth Circuit, in a unanimous opinion, reversed and remanded, holding "that the district court erred by ruling, solely on the basis of the pleadings, that GM's durational limitations on any and all implied warranties were both 'reasonable' and 'conscionable' as a matter of law." (13a.) This reflected the Fourth Circuit's proper understanding of the fact-sensitive nature of reasonability and conscionability. (11a-12a.)

The Fourth Circuit also rejected GM's argument that the Amended Complaint "fail[ed] to allege any facts from which it would appear that the [durational] limitation[s] [were] unconscionable." (14a.) The Court of Appeals found, instead, that

> the amended complaint more than sufficiently particularizes the alleged "overreaching." It specifies ten separate "reasons" why GM's imposition of durational limitations on the operation of implied warranties was both "unreasonable" and "unconscionable".

Id.

Among these ten reasons, the Court of Appeals focused on one (which GM largely ignores in its Petition):

> Perhaps most significantly, plaintiffs also alleged that GM knew of inherent defects in its diesel

engines—but failed to warn its customers of the consequential likelihood of "catastrophic failures."

(15a.)

The Fourth Circuit recognized that "[e]vidence of the 'knowledge of [a] stronger party that the weaker party will be unable to receive substantial benefits from the contract'—or any related showing that 'the transaction involved elements of deception'—should in most cases 'contribute to a finding of unconscionability in the bargaining process' " (19a), *citing Restatement (Second) of Contracts* §208 comment d (1981), *also citing* 15 W. Jaeger, *Williston on Contracts* §1763A, at 224 (1972) (unconscionability includes "the procedural abuse of unfair surprise, usually manifested as a concealment of important facts").

Such unconscionability based on concealment was properly recognized to be "in large measure what plaintiffs here have claimed." (19a.) Of course, the Fourth Circuit "express[ed] no opinion and intimate[d] no view on what may be proven on the matter, as opposed to what we have held was, at this stage, adequately pleaded to withstand the Rule 12(b)(6) motion." *Id.*

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS, AND NO CONFLICT BETWEEN THE FOURTH CIRCUIT AND ANY STATE COURT OF LAST RESORT OR THIS COURT.

In its Petition, GM does not expressly claim, because it cannot claim, that the Fourth Circuit's decision conflicts with the decision of any other court. Indeed, the Fourth Circuit followed the decision of another circuit, *Martin v. Joseph Harris Co.*, 767 F.2d 296, 301-302 (6th Cir. 1985), in holding that warranty limitations could become unconscionable, and thus unenforceable, because of concealment. (19a.)

II. IN ORDER TO SUGGEST "INCONSISTENCY" WITH A DECISION OF ANOTHER CIRCUIT, WHERE NONE EXISTS, GM CONFUSES THE FUNDAMENTAL DISTINCTION BETWEEN EXPRESS AND IMPLIED WARRANTIES, A DISTINCTION CLEARLY RECOGNIZED IN THE MAGNUSON-MOSS ACT.

GM implies that the Fourth Circuit's decision is inconsistent with the decision of the Second Circuit in *Abraham v. Volkswagen of America, Inc.*, 795 F.2d 238 (2d Cir. 1986). Pet. at 22-23. In *Abraham* plaintiffs were barred from pursuing claims for breach of *written warranties* where the alleged defect

manifested itself after the *written warranty* durational limit had expired. 795 F.2d at 249-250.

The Fourth Circuit, however, found *Abraham* to be "clearly distinguishable", because *Abraham* involved durational limitations on *written* warranties, rather than on *implied* warranties imposed by law, as here. (15a-16a.) As even the district court recognized here, "the Second Circuit did not intend to express an opinion as to whether the views announced in *Abraham* would apply in the implied warranty context." (34a.)

In *Abraham* the Second Circuit itself cautioned against confusing the concepts of express and implied warranties. 795 F.2d at 250.[2] GM, however, confuses the concepts. Simply put, express warranties are terms of a contract offered by a manufacturer, while implied warranties arise by operation of law to enforce legally defined norms.[3] The statute itself reflects this difference.

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[2]The Second Circuit's refusal in *Abraham* to bar implied warranty claims was significant, because those plaintiffs did press implied warranty claims. 795 F.2d at 241. The *Abraham* case later was transferred to another district court, where the implied warranty claims went to a jury. *See Deadwyler v. Volkswagen of America, Inc.*, 884 F.2d 779, 780 (4th Cir. 1989), *cert. denied*, No. 89-1036 (U.S. Feb. 20, 1990). While *Abraham* did criticize the decision in *Alberti v. General Motors Corp.*, 600 F. Supp. 1026, 1028 (D.D.C. 1985), to the extent that *Alberti* allowed *express* warranty claims to proceed, the Second Circuit nowhere suggested that the *implied* warranty claims (present in *Alberti* as well as in *Abraham*) were barred by durational limitations.

[3]The Magnuson-Moss Act legislative history clearly and concisely notes that "[a]n implied warranty arises by operation of law rather than out of an agreement or action of the parties to the sale and purchase." H.

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The Magnuson-Moss Warranty Act does not require that *written* warranties be of reasonable duration, or conscionable. (Indeed, there is no requirement that written warranties be made at all.) Thus, there was no statutory basis to avoid the durational limits on express warranties in *Abraham*. By contrast, in §2308(b) Congress explicitly required that *implied* warranties be "of reasonable duration" *and* that any limitation of that duration be "conscionable".[4]

III. GM'S CLAIM THAT THE FOURTH CIRCUIT'S DECISION TO REMAND "INVITES AN OUTPOURING OF MERITLESS WARRANTY LITIGATION" IS ENTIRELY UNFOUNDED.

GM makes the astounding, and entirely unfounded, claim that "[t]he decision of the court of appeals invites

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R. Rep. No. 1107, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 7702, 7707.

[4]GM's attempt to confuse written and implied warranties is illustrated by its claim that Congress considered but rejected a proposal to require warranty durations of at least 20-30% of a product's expected useful life. Pet. at 21. The rejected proposal related only to a minimum *written* warranty duration and had nothing to do with the possibly longer duration of an *implied* warranty. Likewise, GM's reliance on literature noting that manufacturers typically warrant consumer products for a fraction of their useful lives, *e.g.*, Priest, "A Theory of Consumer Product Warranty," 90 *Yale L.J.* 1297 (1981) (Pet. at 21), relates only to *written* warranty duration and is of no relevance to the duration of *implied* warranties that the law superimposes on economic behavior.

an outpouring of meritless warranty litigation in federal and state courts under the Magnuson-Moss Act, burdensome not only to manufacturers but also to the judicial system." Pet. at 23-24. Indeed, this Court is told that " '[w]arranty litigation [already] has exploded in the last decade'..., due in large part to the Magnuson-Moss Act" and that "[t]he Magnuson-Moss Act has led to a dramatic increase in consumer class actions." Pet. at 24 & 25n.16.[5]

There has been no "dramatic increase" in consumer class actions under the Magnuson-Moss Act. Instead, there have been exactly *eight* (8) nationwide class actions in federal courts—approximately one case every two years over the 15 year history of the Magnuson-Moss Act.[6] Even fewer significant state court

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[5]GM's Petition, at 10 & 24, cites B. Clark & C. Smith, *The Law of Product Warranties* iii (1984), for the proposition that "warranty litigation has exploded in the last decade". This claim is based only on "the outpouring of [warranty] cases" in general—not Magnuson-Moss Act cases limited to "consumer products". The motive for this claim is understandable. The authors explain that "strangely enough, there has been no comprehensive treatise that focuses on warranty law as a unified subject. We hope that *The Law of Product Warranties* will fill that need." *Id.* The authors' claims of an explosion may reflect an increase in products liability-warranty suits for *personal injuries*, which are expressly *excluded* from Magnuson-Moss Act coverage by 15 U.S.C. §2311(b)(2).

[6]This is the total of all cases which named 100 plaintiffs as required by 15 U.S.C. §2310(d)(3)(C), when related cases involving the same subject matter are counted only once. In its Petition, at 25n.16, GM lists these as (1) *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir. 1979); (2) *Skelton v. General Motors Corp.*, 661 F. Supp. 1368 (N.D. Ill. 1987); (3) *Alberti v. General Motors Corp.*, 600 F. Supp. 1026 (D.D.C. 1985); (4) *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595 (S.D.N.Y. 1982); (5) *Mullins v. Ford*

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Magnuson-Moss class actions have been filed.[7] The present litigation filed in 1986 is the most recent

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Motor Co., No. 79-2091 (S.D. W. Va. filed Mar. 29, 1979); (6) *Deadwyler v. Volkswagen of America, Inc.*, 884 F.2d 779 (4th Cir. 1989); (7) *Walsh v. Ford Motor Co.*, 807 F.2d 1000 (D.C. Cir. 1986); and (8) *Kaplan v. General Motors Corp.*, No. 81-CV-1252 (E.D.N.Y. Aug. 6, 1984) (which involved the 1978-1980 model year precursors of the 1981-1985 GM diesels involved in this case).

In a misleading attempt to exaggerate the class action caseload, GM adds to this list *Garbo v. Ford Motor Co.*, 1983-2 Trade Cas. (CCH) ¶65,701 (D.D.C. 1982), an earlier name for *Walsh*, and *Abraham v. Volkswagen of America, Inc.*, 795 F.2d 238 (2d Cir. 1986), which involved the same vehicles, class, and claims as *Deadwyler*, and was transferred to the same district court. Indeed, *Mullins* (one of the eight) barely can be counted; soon after that complaint was filed, the case was settled with respect to the named plaintiffs' claims only, and no classwide relief was pursued.

During the early history of Magnuson-Moss litigation, a small number of such federal class actions were dismissed at a preliminary stage for failure even to attempt to name the requisite 100 plaintiffs. *See, e.g., Barr v. General Motors Corp.*, 80 F.R.D. 136 (S.D. Ohio 1978); *Novosel v. Northway Motor Corp.*, 460 F. Supp. 541 (N.D.N.Y. 1978); *Lieb v. American Motors Corp.*, 538 F. Supp. 127 (S.D.N.Y. 1982); *Watts v. Volkswagen, A.G.*, 488 F. Supp. 1233 (N.D. Ark. 1980). These nonrecurring relics cannot be counted as part of any recent litigation "explosion".

[7]GM's class action list (Pet. at 25n.16) includes one of these, *In re Cadillac V8-6-4 Class Action*, 461 A.2d 731 (N.J. 1983), which together with cases like *Joseph v. General Motors Corp.*, 109 F.R.D. 635 (D. Colo. 1986) (statewide class brought under diversity jurisdiction, cited in Pet. at 25n.16), and a third case, *Junglas v. General Motors Corp.*, 242 Cal. Rptr. 365 (App. 1987), were but statewide slices of a single nationwide controversy involving 1981 Cadillacs equipped with allegedly defective "V8-6-4" engines. Respondents are aware of only two other significant state court class actions brought under Magnuson-Moss (as well as other theories): *Osborne v. Suburu of America, Inc.*, 243 Cal. Rptr. 815 (App. 1988); and *In re Audi Class Litigation*, No. 87 CH

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nationwide class action, and in the past 3.5 years there has been *no* nationwide class action filed in a federal court naming the requisite 100 Magnuson-Moss plaintiffs.[8]

The few nationwide Magnuson-Moss Act class actions that survived early dismissal have pursued redress for very serious and widespread product defects, all having been paralleled by proceedings initiated by the Federal Trade Commission,[9] the National Highway Traffic Safety Administration,[10] or state Attorneys General.[11] Contrary to GM's suggestion (Pet. at 27 & n.17), there is simply no empirical evidence of Magnuson-Moss Act "strike suits" where defendants have ever been " '[p]ressure[d]...to

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02076 (Ill. Cir. Ct. Cook Co., Notice of Proposed Settlement published in *USA Today* June 10, 1988).

[8]Respondents are aware of two other class actions including Magnuson-Moss claims that reached federal courts on other jurisdictional grounds: *Oakes v. OKI Electric Indus. Co.*, No. 88-3547 (E.D. Pa. 1989), a classwide settlement involving computer laser printers with federal jurisdiction asserted under RICO, with Magnuson-Moss warranty claims appended, and *Brummett v. Skyline Corp.*, 38 F.R. Serv. 2d 1443 (W.D. Ky. 1984), a state court class action involving allegedly hazardous insulation in mobile homes, removed to federal court by defendants despite the absence of the required 100 named plaintiffs.

[9]*E.g.*, *Skelton*, *Kaplan*, *Mullins*, and *Deadwyler* (and *Abraham*), *supra* note 6.

[10]*E.g.*, *Walsh*, *Alberti*, and *Feinstein*, *supra* note 6.

[11]*E.g.*, *GM Engine Interchange*, *supra* note 6.

settle, even for millions of dollars, and in cases where the merits of the class representative's claim is to say the least doubtful.' "[12]

The possibility of class action "strike suits" under the Magnuson-Moss Act is particularly remote by reason of the requirement of 100 named plaintiffs, 15 U.S.C. §2310(d)(3)(C), which has amply succeeded in its purpose to "avoid trivial or insignificant actions being brought as class actions in the federal courts."[13] Given this and other substantial obstacles, the Fourth Circuit's decision that plaintiffs may develop a factual record on conscionability does not foreshadow any explosion of class action litigation under the Magnuson-

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[12]Defendants have not hesitated to press their cases to trial. *E.g.*, *Deadwyler*, *supra* note 6 (jury verdict for defendants); *see also In re General Motors Corp. Engine Interchange Litigation*, MDL No. 308 (N.D. Ill. June 27, 1981) (jury verdict for plaintiff class, reported in 7 *Class Action Rep.* 2 (1981); verdict subsequently vacated for improper jury instructions and case settled). Although there is little data available on defense costs, plaintiffs' fees and costs consume about 14% of recoveries in common fund antitrust and securities class actions—less than 12% for larger recoveries and 20-30% for smaller ones. *See* 6 *Class Action Rep.* 84, 129 (1980). If defense costs are comparable, and marginal defense costs from the point of settlement far smaller, settlements for sums several times greater than litigation costs must reflect some substantial merit to the class claims. For example, the settlements for $22.5 million in *Kaplan v. General Motors Corp.*, *supra* note 6, of which only 4.4% was consumed by plaintiffs' attorney fees, and for over $21 million in *Skelton v. General Motors Corp.*, *supra* note 6, of which fees consumed about 15%, can hardly be characterized as " 'frivolous claims brought to extort nuisance settlements.' " Pet. at 27.

[13]H.R. Rep. No. 1107, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 7702, 7724.

Moss Act.[14] Counsel in such cases already had long believed that implied warranty recovery could be had for a period longer than the durational limit on express warranties, given appropriate facts.[15]

IV. GM DISREGARDS THE PLAIN STATUTORY LANGUAGE OF §2308(b), AND MISCHARACTERIZES LEGISLATIVE HISTORY, TO REQUEST THAT THIS COURT READ THE CONSCIONABILITY REQUIREMENT OUT OF THE ACT.

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[14]Federal class actions, as noted, require 100 plaintiffs. Most non-class federal court suits have been dismissed at a preliminary stage for failure to satisfy the $50,000 amount in controversy requirement of 15 U.S.C. §2310(d)(3)(B) or because of the exclusion of personal injuries from Magnuson-Moss coverage. *E.g.*, *Saval v. BL Ltd.*, 710 F.2d 1027 (4th Cir. 1983); *Barnette v. Chrysler Corp.*, 434 F. Supp. 1167 (D. Neb. 1977); *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058 (5th Cir. 1984); *Cowan v. Lederle Laboratories*, 604 F. Supp. 438 (D. Kan. 1985); *Fleming v. Apollo Motor Homes, Inc.*, 87 F.R.D. 408 (M.D.N.C. 1980); *Gorman v. Saf-T Mate, Inc.*, 513 F. Supp. 1028 (N.D. Ind. 1981); *Reiff v. Don Rosen Cadillac-BMW, Inc.*, 501 F. Supp. 77 (E.D. Pa. 1980); *Simmons v. Taylor Childre Chevrolet-Pontiac, Inc.*, 629 F. Supp. 1030 (M.D. Ga. 1986); *Washington v. Olasco, Inc.*, 603 F. Supp. 1295 (N.D. Miss. 1985); *Wise v. General Motors Corp.*, 588 F. Supp. 1207 (W.D. Va. 1984).

[15]This shared belief is reflected in the settlements reached years ago in *Skelton* and *Kaplan*, *supra* note 6, providing for reimbursement of repair costs incurred up to 50,000 miles (notwithstanding 12,000 mile durational limits). *See also Skelton v. General Motors Corp.*, 1985-2 Trade Cases (CCH) ¶66,683 at 63,215 (N.D. Ill.) (certifying class for transmission failures up to 60,000 miles).

In its Petition, at 10-19, GM argues that the fairness of bargaining, including active concealment, is irrelevant to conscionability, as a matter of law. This is based on GM's wholly insupportable construction of the plain language in 15 U.S.C. §2308(b), which provides that "implied warranties may be limited in duration to the duration of a written warranty of *reasonable* duration, *if such limitation is conscionable*...[emphasis added]." Clearly, Congress contemplated circumstances where a *written* warranty limitation is "of reasonable duration", at least insofar as the written warranty itself is concerned, but where the corresponding *implied* warranty limitation is not *also* "conscionable".

The Fourth Circuit properly appreciated the import of this language, holding "that the statute authorizes such limitations only if they are also conscionable." (16a.) This holding correctly follows this Court's instruction in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-339 (1979): "In construing a statute, we are obliged to give effect, if possible, to every word Congress used."

GM, however, asks this Court to grant a writ of certiorari to read the word "conscionable" out of §2308(b). GM contends "that an implied warranty of reasonable duration is 'conscionable' without further inquiry" and that "the 'conscionability' of [*implied*] warranty limitations turns solely on...the reasonableness of the 'duration' of the *express* [written] warranty". Pet. at 12-13 (emphasis added). GM's construction is clearly untenable under the plain language of §2308(b).

Moreover, legislative history confirms that Congress intended a conscionability requirement with independent meaning. The House-Senate Conference Committee noted that the House version only permitted limitation of the "duration of an implied warranty *if the limitation was conscionable.*"[16] The Conference Committee further noted that "[t]he conference substitute contains a provision identical to the House provision." *Id.* Thus, it is crystal clear that Congress deliberately intended to require that all durational limitations of implied warranties be "conscionable", *in addition to* the corresponding written warranty being of "reasonable" duration.[17]

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[16] S. Conf. Rep. No. 1408, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 7755, 7758 (emphasis added).

[17] A conscionability requirement was also intended by the drafters of the Senate legislative history upon which GM places so much weight. *See, e.g.*, S. Rep. No. 876, 91st Cong., 2d Sess. 22 (1970) ("an express warranty will control the duration of implied warranties if...the express warranty is of reasonable duration *and* the limitation is conscionable"), *quoted in* Pet. at 12 (emphasis added). Despite GM's focus on an example of an "unreasonably short" express warranty duration in the 1970 Senate Report discussion (Pet. at 13), the following year the same Senate Committee made clear that, whatever the length of the written warranty, a durational limitation of an implied warranty *also* had to be conscionable. S. Rep. No. 269, 92d Cong., 1st Sess. 18, 33 (1971) ("A supplier may not expressly limit the duration of the implied warranty...if [1] such limitation as to duration [of the implied warranty] would be unconscionable or [2] if the duration of the express warranty is unreasonably short").

GM's reliance on 1970 Senate legislative history must fail, not merely because of the 1971 Senate amplification, but because the final Senate bill would have prohibited *any* implied warranty durational limitations, including "conscionable" limitations. S. Rep. No. 151, 93d

(footnote continued on next page)

Conscionability is fact sensitive and includes consideration of the fairness of the bargaining process, as the Fourth Circuit recognized. (11a-12a & 17a-19a.) Even authorities cited by GM recognize that unconscionability may be based on unfair bargaining, as "where the buyer is in an inferior bargaining position, [and]...the seller *uses its superior bargaining position* to oppress or *unfairly surprise* the buyer." 2 O. Harris &

(footnote continued from previous page)
Cong., 1st Sess. 21, 37 (1973). Thus, only the House legislative history is ultimately relevant. The House authors clearly understood conscionability to have independent application to implied warranty durational limitations, and understood that courts would be called on to examine extrinsic facts in deciding whether such limitations were conscionable. *See Consumer Warranty Protection: Hearings on H.R. 6313, H.R. 6414, H.R. 261, H.R. 4809, H.R. 5037, H.R. 10637 (and similar and identical bills) Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. 187-188, 203-204, 265-266 (1971) (hereinafter "*1971 House Hearings*").

Nor can GM rely on language from an FTC pamphlet, *Warranties: Making Business Sense Out of Warranty Law* 8 (1979), which merely advises that "implied warranties can be limited... if the duration [of the implied warranty] isn't so short that it's unconscionable." Pet. at 13. The Act specifically bars any authority for "the Commission to prescribe the duration of written warranties given", 15 U.S.C. §2304(b)(2), much less to issue rules defining how much longer than a written warranty a "conscionable" implied warranty must last. Moreover, GM's comment that under California's Song-Beverly Act, Cal. Civ. Code §1791.1(c), "one year is the *maximum* duration for any implied warranty of merchantability," Pet. at 16n.8, is significant. As one commentator has noted, the conscionability language of §2308(b) "is almost a verbatim copy of part of...California's Song-Beverly Act, enacted in the early 1970s." C. Reitz, *Consumer Product Warranties Under Federal and State Laws* §7.03, at 85 (1987). Yet Congress consciously rejected specific requests that Magnuson-Moss likewise incorporate a one year implied warranty maximum. *1971 House Hearings* at 183.

A. Squillante, *Warranty Law in Tort and Contract Actions* §9.10, at 97 (1989), *quoted in* Pet. at 18n.10 (emphasis added). To develop the record proving that GM's terms were "unreasonably favorable" to itself, that GM used its superior knowledge of the defective nature of these GM diesels "to oppress or unfairly surprise" diesel owners, and other matters relevant to determine unconscionability, plaintiffs are entitled to a remand.[18]

GM misses the mark when it observes, "at the time the Magnuson-Moss Act was passed, the typical automobile [written] warranty (like other consumer product warranties) lasted for only one year." Pet. at 14-15. Rather than approving brief written warranties, the House Committee Report lamented a decline in the duration of written warranties on critical car

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[18]In its Petition, at 11n.5, GM cites cases where courts enforced durational limitations on warranties shorter than those here at issue. Those cases are distinguishable for numerous reasons. Some involved challenges to durations only of *written* and not *implied* warranties. Most did not even involve the Magnuson-Moss Act, or its "conscionability" requirement. None involved knowing concealment of a defective design that resulted in premature and catastrophic failure of a part so significant as an engine. The Fourth Circuit properly rejected GM's argument based on these inapposite citations as "misplaced...[because] determining whether isolated contractual language is 'unconscionable' requires analysis of the particular facts and circumstances surrounding an individual transaction or series of transactions." (13a.) The Fourth Circuit also explained why the Magistrate's Report in *Kaplan v. General Motors Corp.*, No. 81-CV-1252 (E.D.N.Y. Jan. 21, 1983) (relied on in Pet. at 5), "is extremely doubtful precedent", given that the district court in *Kaplan* never considered the Report, and the parties settled shortly after the Report was filed. (13a.)

components (including engines) from 5 years/50,000 miles in 1967.[19] In any event, this is another example of GM confusing written and implied warranties. The proper question was asked by the Fourth Circuit: whether in the particular circumstances, and given GM's actual knowledge regarding defective engine design, the stated durational limitations on *implied* warranties were unconscionable.

The House Committee Report lists as a major Magnuson-Moss objective "safeguards against the disclaimer or modifications of the implied warranties of merchantability and fitness on consumer products".[20] The Fourth Circuit's decision is consistent with that objective, while GM ignores both the statutory language and its purpose.

V. IN A TRANSPARENT ATTEMPT TO MANUFACTURE A QUESTION OF LAW, GM MISCONTRUES THE FOURTH CIRCUIT'S OPINION, WHICH PROPERLY FOCUSED ON GM'S CONCEALED KNOWLEDGE THAT ITS DIESEL ENGINES WOULD FAIL PREMATURELY AND CATASTROPHICALLY.

In its Petition, at 19, GM hyperbolicly suggests that the Fourth Circuit's decision "throws into question not

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[19]H.R. Rep. No. 1107 *supra*, 1974 U.S. Code Cong. & Ad. News at 7708.

[20]*Id.* at 7711.

only the two- and three-year warranties at issue in this case, but virtually all time limitations on implied warranties in the sale of consumer products." This is based on GM's completely false premise, restated in its "Question Presented" and throughout its Petition (at i, 3, 7, 9-10, 13, 17-20 & 24), that the Court of Appeals held that mere allegations of "disparity in bargaining power" and "absence of meaningful choice" are sufficient to prove unconscionability.

Instead, the Fourth Circuit emphasized two of plaintiffs' key allegations: (1) "GM knew of inherent defects in its diesel engines—but failed to warn its customers of the consequential likelihood of 'catastrophic failures' "; and (2) " 'diesel engines[] are designed to and ordinarily do function for ... periods substantially in excess of th[ose] specified in GM's warranties.' " (14a-15a, *quoting* the Amended Complaint.) These were among the ten complementary reasons pleaded by plaintiffs, and evaluated by the Fourth Circuit, under widely accepted principles of unconscionability.[21]

As the Fourth Circuit emphasized:

> One frequently cited case holds, for example, that unconscionability "generally...include[s] an absence of meaningful choice on the part of one of the

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[21]The Amended Complaint's reference to "unequal bargaining power and lack of effective warranty competition among dominant firms in the automobile manufacturing industry" was only *one* of the ten reasons recognized by the Fourth Circuit. (14a.)

> parties together with contract terms which are unreasonably favorable to the other party." *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965). In this circuit we apply a similar test.

(11a.) Given this endorsement of the test in *Williams*, a case on which GM itself relies (Pet. at 18), GM hardly can be heard to complain.

GM takes out of context a single sentence in the Fourth Circuit's opinion:

> Here, the claim is that the plaintiffs' contractual relationship with GM was tainted by an absence of "meaningful choice[s]" and a substantial "disparity in...bargaining power"—facts which, if proven, clearly would establish "unconscionability." *See Kaplan* [*v. RCA Corp.*], 783 F.2d [463,] 467 [(4th Cir. 1986)]; *Williams*, 350 F.2d at 449.

(14a.) This is the sentence that GM cites when it repeatedly complains about the supposed breadth of the Fourth Circuit's opinion and the "litigation explosion" to be generated thereby. *See* Pet. at i, 3, 7, 9-10, 13, 17, 20 & 24.

However, in the paragraph following the cited sentence, the Fourth Circuit explains that the absence of "meaningful choices" incorporates plaintiffs' claim that GM concealed a significant known defect.

> The claim is, of course, that GM imposed its durational limitations on the operation of implied warranties in the course of bargaining tainted by the "concealment of relevant facts"; that *ipso facto*,

> plaintiffs had no "meaningful choice" when they accepted the limitations....

(15a.)[22] Such "concealment of relevant facts" and consequent absence of "meaningful choice" clearly qualify as what GM's own cited authorities call either "terms unreasonably favorable to the stronger party" or terms that "oppress or unfairly surprise the buyer". *See* Pet. at 17-18n.10 (citations omitted).

Citing J. White & R. Summers, *Uniform Commercial Code* §4-3, at 187 (3d ed. 1988), the Fourth Circuit stated: "[O]ne noted treatise observes that 'judicial finding[s] of lack of 'meaningful choice'... [are] usually founded upon a recipe consisting of one or more parts of assumed consumer ignorance and several

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[22]The Fourth Circuit repeatedly stressed the importance of GM's concealment of the defective design. For example:

> Relevant in any such case are specific allegations that a seller abused his "superior knowledge" and the buyer's relative ignorance.... Here, proof that GM knew of and failed to disclose major, inherent product defects would obviously suggest that its imposition of the challenged "durational limitations" on implied warranties constituted "overreaching".... When a manufacturer is aware that its product is inherently defective, but the buyer has "no notice of [or] ability to detect" the problem, there is perforce a substantial disparity in the parties' relative bargaining power.... [B]y definition, unconscionability includes "the procedural abuse of *unfair surprise*, usually manifested as a concealment of important facts."

17a-19a (emphasis added); *see also* 15a, 19a, *quoted supra* at 4-5.

parts of seller's guile' ". This recipe was followed by GM.

GM further distorts the Fourth Circuit's opinion by suggesting that the Court of Appeals' analysis permits consumers to bring Magnuson-Moss Act claims merely by asserting a manufacturer's failure to warrant a product for its entire expected life (Pet. at 20-22), or by pointing to the manufacturer's knowledge that all products will fail eventually after expiration of the warranty period (Pet. at 22-23). This is neither what the Fourth Circuit held, nor what plaintiffs claimed.

The Fourth Circuit explained that "[d]etermining whether temporal warranty limitations are of reasonable duration requires the court to determine nothing more than for how long, given past experience, consumers legitimately can expect to enjoy the use of a product 'worry-free' ". (16a.) The Court of Appeals recognized that "purchasers should 'reasonably' expect that, after a certain period, the product might need repair." *Id.* Plaintiffs' claim that GM's limitations were not of reasonable duration "presents but one, purely objective question: *viz.*, whether it is 'reasonable' to expect a diesel engine supplied by any manufacturer to operate 'without incident' for a given period of time." (17a.)

Plaintiff's allegation that "diesel engines[] are designed to and ordinarily do function without substantial or catastrophic failure for a period substantially in excess of that specified in GM's written warranties" amounts to a claim that the written warranty period—and more particularly the

correspondingly limited *implied* warranty duration—does not cover that "certain period" of reasonably expected "worry-free" product enjoyment.

It has been held, for example, that "as to the most basic part of the vehicle,... an engine designed to operate for at least 100,000 miles should be warranted for in excess of 22,000 miles." *Barris v. J. Paz Ford*, 1981 WL 4461 (Ohio App. Mar. 9, 1981); *cf. Skelton v. General Motors Corp.*, 1985-2 Trade Cas. (CCH) ¶66,683 at 63,215 (N.D. Ill.) (finding that automobile "transmission life is dependent upon mileage and not vehicle age", and certifying implied warranty class for transmission failures up to 60,000 miles). For 1981 and 1982 model year GM diesels, however, engine repairs were fully covered for only 12 months or 12,000 miles, with partial coverage for another 12 months or 12,000 miles, and with no coverage thereafter. Whether this limitation was conscionable, under the particular circumstances of concealment and given the far longer expected useful life of a diesel engine, is a question of fact.

Finally, as is obvious by even the most perfunctory reading of the Fourth Circuit's decision, there is no holding allowing plaintiffs to sue merely because GM knew that the product eventually would fail. Nor have these plaintiffs (or any other Magnuson-Moss plaintiffs known to them) ever embraced the extreme position that GM constructs as a straw man. The allegation is *premature* failure—not that these diesel engines should have been impliedly warranted forever.

CONCLUSION

There is no conflict between the Fourth Circuit's decision and that of any other court. In remanding for development of a factual record, the Fourth Circuit did not decide any significant question of law that should be reviewed by this Court. For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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